DOJ thus allows itself to be guided by a policy disagreement with Congress's exclusive yardstick for testing whether local markets are open to competition. By rejecting the checklist as the governing standard for purposes of deciding whether Southwestern Bell must do more to open its local markets, DOJ exceeds the boundaries of its expertise and discretion.

DOJ Seeks to Usurp the State Commission's Role. DOJ has also ignored the factual findings of the OCC that support Southwestern Bell's interLATA entry.[2] Whereas Congress wanted DOJ to apply its antitrust expertise to the public interest inquiry of § 271(d)(3), it instructed the FCC to consult with the relevant state commission "in order to verify the compliance of the Bell operating company" with the checklist and other local market requirements of § 271(c). Consistent with its charge, and with the encouragement of DOJ itself, the OCC conducted proceedings lasting several months to investigate Southwestern Bell's application. Not content to accept an administrative law judge's report that relied on information many weeks old, the OCC itself conducted a public hearing; received and reviewed thousands of pages of submissions by Southwestern Bell, AT&T, MCI, Sprint, and others; and directed on-site staff investigations into OSS access, collocation, and other checklist issues.

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[2] Comments of the Oklahoma Corporation Commission on the Application of SBC Communications Inc., Southwestern Bell Telephone Company and Southwestern Bell Long Distance for Provision of In-Region InterLATA Services in Oklahoma, Application by SBC Communications, Inc., CC Dkt. No. 97-121 (filed May 1, 1997) ("OCC Comments").

Based on its investigation, its familiarity with market conditions in Oklahoma, and its knowledge of the business plans and operations of individual competitors in its State, the OCC soundly rejected all allegations that Southwestern Bell had fallen short of its checklist duties or dealt improperly with local competitors. It held that the current state of local competition in Oklahoma reflects competitors' "internal business plans and operations, not . . . the unavailability of [checklist] items from [Southwestern Bell]." OCC Comments at 8. The OCC further noted that a number of companies (19 at last count) have entered into voluntarily negotiated local interconnection agreements with Southwestern Bell, while only one company (AT&T) has thought it necessary to have the OCC arbitrate a dispute. See id. The OCC thus determined that Southwestern Bell meets all statutory requirements for entering the long distance business in Oklahoma.

Beyond this, the OCC concluded that approval of Southwestern Bell's § 271 application would benefit the people of Oklahoma not only by intensifying interLATA competition, but also by pushing competitors to speed their entry into the local telephone business. Id. at 10-11. It "specifically reject[ed]" the argument, embraced by DOJ, that Southwestern Bell's compliance with local competition requirements of the 1996 Act would best be assured by delaying its participation in long distance. This approach, the OCC stated, "would unnecessarily delay or deprive Oklahoma telephone consumers of additional choice with respect to their long distance service" as well as foreclose "the best and quickest way to" interest the major long distance carriers and others in providing local service in Oklahoma. Id.

DOJ chose not to take part in the state proceedings, even though Southwestern Bell encouraged it to do so. Nevertheless, DOJ bases its conclusions upon the same complaints that were reviewed and rejected by the OCC after thorough investigation. Brushing aside the OCC's findings with barely a pause, DOJ Evaluation at 24-26, DOJ suggests that it, rather than the OCC, is the expert assessor of local market conditions and of Southwestern Bell's efforts to comply with the checklist in Oklahoma. That is wrong, as Congress recognized by giving the state commissions a central role in implementing the local competition provisions of the 1996 Act and in assessing Bell company compliance with § 271(c). The OCC's findings, moreover, are based upon Congress's checklist and a comprehensive investigation, while DOJ's evaluation meets neither test of reliability.

When discussing the steps Southwestern Bell has taken to open the local telephone business in Oklahoma, DOJ in nearly every instance accepts complaints of long distance carriers and other competitors at face value. It never considers these parties' motives or Southwestern Bell's record responses. And, although DOJ discounts factual findings the OCC made after its extensive proceedings and investigation, DOJ made no serious effort to ascertain the facts for itself.

In the very limited area where the Department conducted any investigation of its own (by asking Southwestern Bell to demonstrate how competitors can access its OSSs), the Department's approach was equally unbalanced. Prior to its filing, DOJ merely indicated OSSs should be able to handle "gas in the pipeline" and that its opinions might evolve as competitors used Southwestern Bell's OSSs in greater

numbers; it never identified specific perceived deficiency or proposed any change in Southwestern Bell's systems. To the contrary, DOJ staff generally praised Southwestern Bell's efforts to provide access to OSSs. Having avoided discussing with Southwestern Bell its specific concerns and suggested modifications, DOJ did not gather the information it needed to make an informed and reliable recommendation.

DISCUSSION

I. THE PUBLIC INTEREST INQUIRY AND DOJ's ANTITRUST EXPERTISE

Congress decided what was necessary and sufficient to open local markets and it enshrined its conclusions in § 271(c). It required a Bell company to demonstrate that its local telephone markets are open to competitors by using either actual interconnection agreements with facilities-based carriers or a statement of the terms and conditions that the Bell company offers to all competitive local exchange carriers ("CLECs"). Either way, the Bell company must demonstrate that it makes available all 14 items of the Act's competitive checklist. This checklist is Congress's test for when markets are sufficiently open, and Congress forbade the FCC to second-guess its judgment. Section 271(d)(4) specifically provides that the FCC "may not, by rule or otherwise, limit or extend the terms used in the competitive checklist," thereby preventing the FCC from imposing additional preconditions by way of its public interest inquiry. Compliance with the competitive checklist is determined by the FCC in consultation with the relevant state commission.

It was only when it turned to the effect of Bell company entry on long distance competition that Congress provided a role for DOJ. The House Bill instructed "the

Attorney General [to] provide to the Commission an evaluation of whether there is a dangerous probability that the Bell operating company or its affiliates would successfully use market power to substantially impede competition in the market such company seeks to enter." § 245(c)(3). While the Senate Bill allowed the Attorney General more flexibility — instructing her to "apply any appropriate standard," § 221(c)(2)(A) — the Senate nonetheless had in mind an antitrust standard similar to that envisioned by the House: "The Attorney General may analyze a Bell operating company application under any legal standard (including the Clayton Act, Sherman Act, other antitrust laws, section VIII(c) of the MFJ, Robinson-Patman Act or any other standard)." S. Rep. No. 104-23, at 43. The Conference Report similarly indicates that, although DOJ is free to chose a standard, the target of its antitrust analysis should be the competitive effects of Bell company interLATA entry. It even offers specific examples of antitrust standards that would be appropriate, "including: (1) the standard included in the House amendment, whether there is a dangerous probability that the BOC or its affiliate would successfully use market power to substantially impede competition in the market such company seeks to enter; [or] (2) the standard contained in section VIII(C) of the AT&T Consent Decree, whether there is no substantial possibility that the BOC or its affiliates could use monopoly power to impede competition in the market such company seeks to enter." S. Conf. Rep. No. 104-230, at 149.

In the final days before enactment, legislators confirmed that under the Conference agreement, "the Department of Justice will apply any antitrust standard

it considers appropriate,"[3] and that the "substantial weight" to be accorded to the views of the Attorney General is limited to her "expertise in antitrust matters."[4]

DOJ's discretion thus extends to selecting an antitrust standard and evaluating the competitive effects of Bell company entry into the long distance market under that standard. Indeed, DOJ itself concedes that the "legislative history . . . clearly indicates that Congress contemplated that the Department would be undertaking a substantial competition-oriented analysis," and that the "illustrative examples of possible standards mentioned by Congress all were drawn from the antitrust laws and antitrust consent decrees, under which such a competition analysis would be performed by the Department drawing upon its special expertise." DOJ Evaluation at 39 n. 46.

II. DOJ AGREES THAT SOUTHWESTERN BELL'S ENTRY WOULD BE PRO-COMPETITIVE AND BENEFIT LONG DISTANCE CONSUMERS

DOJ agrees with the OCC that Southwestern Bell's interLATA entry will promote long distance competition and, in that respect, serve the public interest. It explains: "InterLATA markets remain highly concentrated and imperfectly competitive, . . . and it is reasonable to conclude that additional entry, particularly by firms with the competitive assets of the BOCs, is likely to provide additional competitive benefits." DOJ Evaluation at 3-4. DOJ's economic expert describes the "efficiencies from jointly

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[3] 142 Cong. Rec. H1157 (statement of Sen. Hyde) (daily ed. Feb. 1, 1996) (emphasis added).

[4] 142 Cong. Rec. H1176 (daily ed. Feb. 1, 1996) (statement of Rep. Jackson-Lee); 142 Cong. Rec. H1178 (daily ed. Feb. 1, 1996) (statement of Rep. Sensenbrenner) ("FCC's reliance on the Justice Department is limited to antitrust related matters").

providing local and long-distance services" including "on the supply side, the cost savings from joint retailing of services" and "on the demand side, the value to consumers of one-stop shopping and other new integrated services." Schwartz Aff. ¶ 83. In particular, Bell companies will "be especially well placed to address lower-volume customers" because Bell companies already incur most of the "'fixed and common costs'" such as billing in providing local service. Schwartz Aff. ¶ 94.

DOJ neither questions that competitive safeguards suffice to prevent cost misallocation and discrimination in long distance markets, nor argues that greater local competition is needed to prevent such anticompetitive conduct. To the contrary, DOJ explains that "the scope for a BOC, after allowed interLATA entry, to degrade existing access arrangements used by IXCs is relatively limited" even during the period while local competition is developing. Schwartz Aff. ¶ 140.

III. DOJ WOULD DELAY INTERLATA ENTRY BY ADDING PRECONDITIONS CONGRESS REJECTED

DOJ thus opposes Southwestern Bell's interLATA entry in Oklahoma based not on antitrust concerns, but rather upon its belief that Congress erred in drafting the competitive checklist. DOJ questions Congress's central judgment that "the statutory entry tracks and competitive checklist" would be "[]adequate to open fully the local telephone markets" and claims that what is needed, instead, is a "practical evaluation of the degree to which the local telephone markets in a particular state have been opened to competition." DOJ Evaluation at 38-39. DOJ therefore proposes its own test of whether markets are "fully and irreversibly ope[n]." Id. at 41.

Under DOJ's test, it ultimately does not matter whether a Bell company has satisfied the competitive checklist as set out by Congress and interpreted by the FCC and the relevant state commission. Nor does it matter whether the Bell company will comply with the safeguards of section 272, or whether its interLATA entry would augment long distance competition without causing offsetting competitive harm. Rather, in DOJ's view, a Bell company should not be permitted to enter long distance unless it also has met additional "preconditions" established by DOJ. Schwartz Aff. ¶ 17.

DOJ does not give an exhaustive list of all additional requirements it intends to impose in reviewing Bell company applications, but examples of new obligations proposed by DOJ that are not found in the Act or FCC rules include:

- a Bell company's agreements with CLECs must "establish a sufficiently comprehensive set" of "performance benchmarks," DOJ Evaluation at 47-48, 60 & Addendum at 4-6; Friduss Aff. ¶¶ 19, 23, 42, 60, 71-74;

- the Bell company must exceed FCC service-quality reporting requirements, DOJ Evaluation at 60-61; Friduss Aff. ¶ 58;

- in addition to complying with the Act's requirements, Bell company prices must be indexed to inflation or otherwise "remain within a tolerable range of . . . interim levels," Schwartz Aff. ¶ 183, and they must be "procompetitive," id. ¶ 188;

- prices also "must provide the opportunity for economically efficient entry," DOJ Evaluation at 50;

- there must be "no major state regulatory or other artificial barriers" to local entry — a factor that (as DOJ's own expert admits) is beyond Bell company control and is properly addressed by enforcing 47 U.S.C. § 253, id. ¶ 189 & n.68;

- a Bell company must not only provide each of the checklist items but must provide them "in a manner" that will promote the "effective[]" operations of its competitors, DOJ Evaluation at 21;

- a BOC must demonstrate the viability of "the various types of competition contemplated by the 1996 Act — the construction of new networks, the use of unbundled elements of the BOC's network, and resale of the BOC's services," DOJ Evaluation at 41;

In particular, DOJ proposes to extend the checklist requirement that a Bell company provide non-discriminatory access to OSS functions. DOJ claims expertise in the design, development, operation, and monitoring of complex systems for accessing the OSSs that are used to order, provision, maintain, repair, and bill telecommunications services. Based on this assertion of technical expertise, DOJ proposes a set of new requirements, over and above those included in FCC orders:

- DOJ asserts that a Bell company must provide "the types of automated systems that, in the Department's experience, are likely to be necessary to provide adequate wholesale support processes," DOJ Evaluation at 28;

- DOJ adds that "compliance requires automated support systems" without regard to whether the Bell company uses manual access, whether industry standards exist for an automated version of access, or whether a CLEC has stated its willingness to pay for a technically feasible departure from standard access, DOJ Evaluation at 28;

- although DOJ recognizes that "checklist compliance only requires a demonstration that a BOC's wholesale support processes provide adequate functionality and operability," it nonetheless would require in addition "a record of performance benchmarks measured in an objective fashion," DOJ evaluation at 47-48.

DOJ is far from clear in explaining how it will apply its preconditions in practice. However, all of them — including those pertaining to OSS and other matters — seemingly will be enforced where the Bell company does not yet face "sufficiently

diverse local competition," Schwartz Aff. ¶ 180. Many apparently apply even when such competition exists. Regardless, moreover, DOJ would require the Bell company to demonstrate that "all major new systems necessary to open the local market" have a "sufficient track record of performance." Schwartz Aff. ¶¶ 17, 180. In DOJ's view, "[s]uch an entry standard does a better job of aligning incentives" than mere satisfaction of the competitive checklist. Id. ¶ 17.

The preconditions DOJ proposes to add to the competitive checklist amount to a requirement of actual local competition of the sort Congress refused to adopt.[5] DOJ's extra hurdles are impossible to fulfill absent actual local competition: CLECs will not purchase all network elements in sufficient quantities to provide the Bell company with "a sufficient track record of performance" if those CLECs have not yet entered the market. Thus, although DOJ claims that its test "does not foreclose the possibility of BOC interLATA entry, even if the BOC faces no significant local competition in a state," DOJ Evaluation at 48, the test itself says just the opposite. DOJ's test prevents Bell company entry by assuming that "lack of competitive entry" means "that local markets are not yet fully open," id. at 43, and that "the absence of successful entry in a state reasonably gives rise to the inference that the state's local markets are not yet open to competition," id. at 49.

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[5] 141 Cong. Rec. S7972, S8009 (daily ed. June 8, 1995) (statement of Sen. Hollings); 141 Cong. Rec. S8310, S8319 (daily ed. June 14, 1995) (statement of Sen. Kerrey); 141 Cong. Rec. H8454 (daily ed. Aug. 4, 1995) (statement of Rep. Bunn).

In applying these presumptions against Southwestern Bell, DOJ not only ignores Congress' legal prohibition on metric tests of local competition and extensions of the checklist, but also the OCC's factual finding — based on its oversight of interconnection agreements and intrastate service certifications as well as its § 271 investigation — that "the failure of some companies, even those with approved interconnection agreements, to enter the Oklahoma local exchange market, is due to internal business decisions of these companies and is not due to [Southwestern Bell's] failure to make available all of the items contained in the checklist." OCC Order at 3.

DOJ's test is unsound from a policy standpoint as well. Even if the FCC were to overlook Congress's prohibition on extending the checklist and DOJ's lack of expertise beyond antitrust matters, it still would have to reject DOJ's additional preconditions as inconsistent with the public interest. As noted above, DOJ candidly acknowledges that long distance consumers would benefit today from the interLATA entry of Southwestern Bell. Yet DOJ opposes Southwestern Bell's entry without offering any concrete, countervailing evidence of a benefit to local consumers from delay, let alone evidence that such benefits would outweigh the significant consumer losses in long distance. DOJ also ignores that its approach would give the opponents of Bell company entry an additional means of delaying that entry indefinitely and that, as the OCC found, Bell company entry into long distance likely will speed the advent of actual local competition. In short, DOJ's additional pre-conditions are as unwise as unlawful.

If DOJ had provided the antitrust analysis requested of it, its opinion would be entitled to "substantial weight" before the FCC under § 271(d). Instead, DOJ chose to provide advice that the FCC is powerless to accept. Although DOJ argues that local markets will not be "irreversibly opened" until CLECs are present in sufficient size and scope, Congress decided otherwise. To accept DOJ's extra-statutory preconditions and counter-factual assumptions would directly violate the Act by extending — indeed, supplanting — Congress's competitive checklist.[6]

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[6] DOJ's analysis of the two "Tracks" of § 271(c)(1) is similarly infected by its adherence to a policy preference for tying interLATA entry to actual competition in local markets, in direct conflict with the relevant decisionmakers. In particular, there is no merit to DOJ's claim that simply intending to become a qualifying facilities-based provider of business and residential service under Track A, and "working toward that goal," makes a CLEC "such provider" for purposes of foreclosing Track B. DOJ Evaluation at 18. Congress did not instruct the FCC to base interLATA entry upon guesses regarding CLECs' true business plans.

This is clear not only from the language of the statute, but even more so from the Conference Report on the Act and the floor statements by such legislators as Representatives Hastert (who drafted the relevant language of § 271(c)(1)(B)) and Tauzin. These congressional sources unequivocally explain that "Section 271(c)(1)(B) provides that a BOC may petition the FCC for this in-region authority if it has . . . not received . . . any request for access and interconnection from a facilities-based carrier that meets the criteria in section 271(c)(1)(A)." 142 Cong. Rec. H1152 (daily ed. Feb. 1, 1996) (statement of Rep. Hastert); see 141 Cong. Rec. H8425, H8458 (daily ed. Aug. 4, 1995) (statement of Rep. Tauzin) (Track B is available unless "the exclusively or predominantly facilities based [local service] provider described in subparagraph [271(c)(1)](A)" has requested interconnection and access from the Bell Company); S. Conf. Rep. No. 104-230 at 147, 148 (Track B triggered by failure of a "facilities-based competitor that meets the criteria set out in new section 271(c)(1)(A)" to request access).

IV. DOJ'S RELIANCE ON COMPETITORS' ACCUSATIONS IS MISPLACED

Whether purporting to apply the checklist that Congress actually drafted, or its own litmus test of local competition, DOJ's analysis reveals a debilitating disregard for the facts. Congress expected DOJ to apply its antitrust expertise to concrete evidence, particularly the evidence it had "accumulated" "[t]hrough its work in investigating the telecommunications industry and enforcing the MFJ."[7] DOJ itself recognized the need to gather evidence in reviewing 271 applications, and urged state commissions to initiate fact-findings on § 271 compliance when fulfilling their consultative role.

Yet, without any on-site investigation in Oklahoma, DOJ levels accusations that were specifically rejected by the OCC and are supported only by the self-serving allegations of SWBT's competitors. DOJ actually denies that these competitors have any incentive to delay Southwestern Bell's interLATA entry, whether to retain negotiating leverage in local markets, maintain a head-start over Southwestern Bell in bundling local and long distance offerings, or protect their current long distance profits. DOJ Evaluation at 19.

If DOJ had participated in the OCC's proceedings, many of its factual misunderstandings would have been resolved. Yet, when Southwestern Bell urged DOJ to participate in these proceedings in Oklahoma, DOJ declined. Moreover, while

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[7] 142 Cong. Rec. S711 (daily ed. Feb. 1, 1996) (statement of Sen. Thurmond); see 142 Cong. Rec. 698 (daily ed. Feb. 1, 1996) (statement of Sen. Kerrey) (same); see also Statement by the President in Signing of the Telecommunications Act of 1996, at 2 (Feb. 8, 1996) (same).

Southwestern Bell Telephone Company ("SWBT") staff asked the DOJ for an opportunity to respond to its specific concerns regarding its OSS access, no such opportunity was ever provided to SWBT.

DOJ chose to keep its untested conclusions regarding checklist compliance by SWBT to itself and to leave real fact-finding to the OCC. Accordingly, DOJ is in no position to question the facts that the OCC found after its full scale investigation of the status of local markets in Oklahoma. Yet, incredibly, DOJ does just that. Based solely upon opponents' allegations, DOJ concludes that "SBC's failure to provide adequate facilities, services and capabilities for local competition is in large part responsible for the absence of substantial competitive entry." DOJ Evaluation at 36. These serious accusations are flatly at odds with the OCC's factual findings that "no party claimed that an element that must be made available under the checklist was not generally offered by SWBT or available from SWBT," OCC Comments at 8, and that "the failure of some companies . . . to enter the Oklahoma local exchange market, is due to internal business decisions of these companies and is not due to SWBT's failure to make available all of the items contained in the checklist." OCC Order at 3.

Given the inadequate factual foundation of the DOJ evaluation, it cannot be used to override the informed findings and conclusions of the OCC. Moreover, DOJ's specific checklist complaints — which deal with negotiations, interim number portability, collocation, OSS, and pricing — suffer from the same flaws as its broad generalizations. Indeed, they serve only to illustrate the defects that pervade the

Department's analysis. Each of DOJ's specific allegations rests upon erroneous factual assumptions that were properly investigated and unequivocally rejected by the OCC.

A. Negotiations

Contradicting the findings of the OCC and without citing any specific support, DOJ accuses SWBT of dragging its feet in negotiating and implementing local interconnection agreements in Oklahoma. DOJ Evaluation at 56. In fact, SWBT has done all it can to speed the negotiation and implementation process. In the 16 months since enactment of the 1996 Act, SWBT has received 48 requests for negotiations in Oklahoma. Only four companies sought arbitration, and three withdrew their requests before arbitration hearings began because they had successfully reached agreements with SWBT. Nineteen CLECs have completed agreements with SWBT in Oklahoma entirely through voluntary negotiations, without any involvement by the OCC. In all this time, only AT&T — whose demands have resulted in arbitration in every state where it has sought an agreement — has thought it necessary to utilize the state arbitration mechanism that Congress provided to ensure against Bell company delay.

Moreover, aside from AT&T's arbitration request and issues presented in the OCC's 271 proceeding, the OCC has received no complaints about SWBT's satisfaction of its local interconnection and access duties from any of the nearly 50 CLECs with which SWBT has negotiated. The accusations DOJ adopts as its own were raised specifically to block Southwestern Bell's interLATA entry. Furthermore, after a thorough investigation into SWBT's compliance with § 271, the OCC rejected these newly minted claims.

B. Interim Number Portability

The OCC found that Southwestern Bell is fulfilling its obligation to provide interim number portability in Oklahoma. DOJ nevertheless asserts that "SBC has failed to provide adequate interim number portability as required by the competitive checklist." DOJ Evaluation at 34. In lodging this accusation, DOJ does not contest that SWBT's effective statement of generally available terms and conditions for interconnection and access in Oklahoma, and all of its state-approved interconnection agreements, guarantee the provision of interim number portability by SWBT. Rather, DOJ bases its accusation principally upon its belief that "Brooks' customers had experienced delays of up to several hours between disconnection (for billing purposes) and reconnection of the customer's line with remote call forwarding." DOJ Evaluation at 35.

It is difficult to see how DOJ can fault Southwestern Bell when Brooks itself concedes — and the OCC has found — that these service interruptions did not reflect any technical problems with SWBT's number portability procedures. DOJ Evaluation at 35; OCC at 6. To the contrary, they were due largely to Brooks Fiber's own ordering error, when Brooks submitted a set of orders to SWBT's retail business office rather than the office that handles CLEC orders.

DOJ nonetheless asserts without support that "the information before the Commission would not yet justify the conclusion that SWBT has the processes or resources in place to handle a commercial quantity of INP orders in an efficient manner." DOJ Evaluation at 36. This flatly contradicts the OCC's informed finding

that any "initial start-up problems" "have been resolved or are being resolved," OCC Comments at 6; OCC Chairman Graves' observation that, "SWBT is providing interim number portability support that the OCC ordered in the SWBT/AT&T arbitration decision," Additional Comments of Cody L. Graves at 2; and the fact that Southwestern Bell has successfully ported over 2500 numbers for Brooks Fiber in Oklahoma.

C. Collocation

The OCC concluded that Southwestern Bell has met its collocation responsibilities under the 1996 Act and applicable rules. DOJ's analysis of collocation issues ignores entirely both the OCC's finding and the fact that SWBT has already turned over 11 collocation cages to Brooks Fiber. DOJ's claim that SWBT "has failed to provide adequately the physical collocation requested by Brooks" is based upon DOJ's misunderstandings about four collocation requests that, DOJ wrongly claims, were placed by Brooks Fiber in June 1996. DOJ Evaluation at 31-32. The facts, discussed in the record of the OCC's investigation, show that Brooks initially placed two physical collocation orders in July and two in August of 1996. Brooks continually revised those requests in the succeeding months, and its revisions became so substantial that it resubmitted these four requests in their entirety in early December, 1996. Even after placing these new orders, Brooks again modified its power requirements. Based upon final specifications submitted on December, 20, 1996, SWBT committed to completing all four collocation jobs by April 11, 1997. Three of the four were turned over to Brooks Fiber on April 11 as promised, and the fourth job

was turned over two weeks later, following completion of an additional modification requested by Brooks.

Of the 11 collocation cages turned over to Brooks Fiber in Oklahoma, seven were completed by SWBT in 85 days or less, and none took longer than 140 days. Once these spaces were turned over, Brooks and its vendors became responsible for installing their equipment. Thus, if Brooks does not currently have "working" collocation in Oklahoma, this is because it has not completed its own installation work in any of the 11 collocation spaces.

When DOJ's factual misunderstandings are cleared away, SWBT's dealings with Brooks Fiber demonstrate that SWBT is providing collocation in compliance with its interconnection agreements and the checklist. Indeed, OCC Chairman Graves pointed out in his report to the FCC that, by Brooks Fiber's own account, "the collocations issues, as an example, were working themselves out as both Brooks Fiber and SWBT became more familiar with each other's needs." OCC Comments, Additional Comments of Cody L. Graves at 2.

Although DOJ focuses its analysis on Brooks Fiber, it also argues that "[t]he fact that potential facilities based competitors other than Brooks have requested physical collocation in Oklahoma and have yet to receive it from SWBT strongly suggests that the problems experienced are attributable to SBC." DOJ Evaluation at 33. In particular, DOJ mentions a December 13, 1996 request from Dobson Wireless for interconnection negotiations, not collocation. Dobson did not request collocation until February 24, 1997. Moreover, DOJ fails to mention that SWBT promptly responded

to that request — working out the details and issuing a final quote by April 11, which Dobson accepted on April 21 based upon a scheduled completion date in July. DOJ also refers to SWBT's negotiations with Cox Communications, but those negotiations only highlight SWBT's willingness to accommodate the needs of CLECs. In response to Cox's requests, SWBT revised its general policies regarding installation of power plant, and its pricing of Cox's particular collocation requests. SWBT is presently implementing physical collocation arrangements with both Dobson and Cox.

D. OSS

The OCC and its staff reviewed Southwestern Bell's provision of access to its OSSs and found Southwestern Bell in compliance with the checklist requirements. DOJ , however, seeks to expand those requirements and accuses SWBT of failing to meet DOJ's additional criteria. DOJ's position rests on a basic legal error and a host of accompanying factual errors.

DOJ's Legal Error. DOJ's Evaluation is based on the unlawful premise that the public interest inquiry may be used to expand a Bell company's OSS obligations under the checklist. DOJ argues that it is not enough for SWBT to (1) ensure non-discriminatory access to SWBT's existing OSS functions, (2) negotiate with CLECs in good faith regarding new interfaces, and (3) implement new forms of technically feasible access upon request at the CLEC's expense. As noted earlier, DOJ proposes a host of additional preconditions, that include requiring Bell companies to automate all existing manual OSS access, and to meet various performance benchmarks. Most significantly, DOJ asserts that SWBT must demonstrate an established track record

of actual performance for electronic interfaces that CLECs are not yet capable of testing or using, and for which no industry standards yet exist. DOJ Evaluation at 78, 81; Schwartz Aff. ¶ 180. Neither the Act nor the FCC's implementing regulations, however, condition checklist compliance upon achieving the impossible.

SWBT has provided CLECs with parity, by ensuring them nondiscriminatory access to the very same interfaces and functions that SWBT's own retail personnel use. Indeed, the OCC's Chairman observed that "SWBT is providing OSS at the same level they provide it internally." Additional Comments of OCC Chairman Graves at 203. SWBT also has met, and will continue to meet, industry standards that call for the development of new interfaces. Moreover, SWBT has worked with individual CLECs to modify its standard interfaces to accommodate their individual needs. It even has developed and tested new, state-of-the-art electronic interfaces to accommodate CLECs' preferences in anticipation of industry standards, provided CLECs with all relevant information on these interfaces, and invited them to conduct joint testing. But, there is only so much SWBT can do alone. It is now up to CLECs to take advantage of the interfaces that SWBT makes available, or to order ones that will meet their own unique needs.

Indeed, the FCC's implementing orders expressly state that a Bell company cannot be penalized because CLECs are not ready to utilize a particular interface. The rules recognize that in developing new interfaces in the absence of industry standards, a Bell company will "need to decide upon interface design specifications and modify and test software." FCC Order 96-476 ¶ 6. And, the FCC's orders require the Bell

company to "establish and make known to requesting carriers the interface design specifications that [it] will use to provide access to OSS functions." Id. ¶ 8. But "as with other network elements" a Bell company's "obligation arises only if a telecommunications carrier has made a request for access." Id. Moreover, "the actual provision of access to OSS functions by an incumbent LEC must be governed by an implementation schedule established through negotiations or arbitration." Id. If a CLEC has not requested access, or is not yet ready to implement it, this does not undermine the Bell company's checklist compliance.

DOJ's Factual Errors. DOJ blames SWBT for the failures and delays of CLECs. It claims — without support — that "SBC has thwarted CLEC attempts to test and commercially use the wholesale support processes SBC claims to provide," DOJ Evaluation at 30; see id. at 59 (same). DOJ once again wrongly assumes that where a CLEC has not yet taken advantage of a checklist item, that item must not be available.[8] Indeed, DOJ does not refer to a single example of SWBT conduct to support its conclusion that SWBT — rather than CLECS — are responsible for the pace at which CLECs have requested access to OSS.

More specifically, DOJ is wrong to conclude (based upon a misreading of SWBT's application) that SWBT "has not completed internal testing of the interaction of its EDI interface and internal processes." DOJ Evaluation at 81-82. SWBT has completed necessary internal tests and has been waiting for CLECs to participate in

[8] Significantly, DOJ's OSS expert Michael Friduss did not even participate in SWBT's demonstrations of OSS interfaces for the Department.

joint testing. Joint testing is already underway for some OSS interfaces, but for the most part CLECs are not yet ready to engage in joint testing. AT&T and others have repeatedly put off SWBT's invitations to begin such testing, as SWBT explained before the OCC and directly to DOJ.

The fact that SWBT has continued to conduct extra tests on its own in the interim — by having SWBT personnel mimic anticipated CLEC orders until CLECs are ready to participate — reflects the lengths to which SWBT has gone to ensure the adequacy of its systems. Moreover, in contrast to DOJ's apparent belief that SWBT's OSS implementation trails that of other Bell companies, AT&T acknowledged in state proceedings that SWBT is a national leader in developing OSS interfaces that adhere to national standards. And while the Department's report makes much of SWBT's failure to retain outside consultants to evaluate its OSSs, DOJ Evaluation at 83-84, the Department had never indicated to Southwestern Bell that such review would be required or appropriate, despite many opportunities to do so in the last 15 months.

DOJ also accepts at face value the allegations of interexchange carriers that SWBT has delayed providing "information needed to begin development of CLEC interfaces." DOJ 59-60. These allegations are totally unfounded. For example, SWBT met with MCI on three occasions in November and December of 1996 to explain its formats. On February 3, 1997, SWBT provided MCI with OSS interface hardware and software specifications and offered to discuss options in detail. On March 20, 1997, SWBT hosted MCI and provided thorough demonstrations of its OSS interfaces. Just this month, on May 7 and 8, SWBT held OSS implementation

meetings with MCI. Similarly, SWBT has provided AT&T with extensive documentation on its specifications for ordering network elements. Indeed, SWBT has gone so far as to present its specifications in whatever format AT&T finds most useful (even if other CLECs or SWBT typically use a different format).

E. Pricing

In its proceedings on SWBT's interLATA entry, the OCC found that SWBT's rates are consistent with the pricing provisions of the Act, including § 252(d)(1)'s requirement of cost-based rates. OCC Comments at 9-10. Particularly where it did not participate in any of the relevant state proceedings, DOJ is in no position to second-guess the OCC's determination on an issue that the 1996 Act expressly reserves to the States. See § 252.

In an effort to get around this problem, DOJ wrongly denies that the OCC approved SWBT's rates as cost-based. DOJ Evaluation at 61. DOJ also questions the prices the OCC approved in an arbitration proceeding between AT&T and Southwestern Bell, after reviewing cost studies submitted by both parties. DOJ points to "disputes between SBC and some potential competitors . . . as to what would constitute cost-based wholesale rates" and claims that there is "some reason to suspect that SBC's . . . prices in Oklahoma exceed its true costs" in light of these negotiating disputes. DOJ Evaluation at 62. DOJ thus elevates the self-interested claims of competitors over the factual findings of the OCC, and even confuses negotiating positions with the provisions of the checklist.

Indeed, DOJ accepts as truth bargaining positions that CLECs themselves have abandoned. For example, DOJ appears to adopt the accusations of Metropolitan Access Networks (MAN) regarding collocation prices in Texas (while at the same time ignoring SWBT's detailed response to MAN's complaints). DOJ Evaluation at 34 n.43 & Attach. F. After DOJ filed its evaluation, however, MAN, resolved its differences with SWBT, withdrew its request for arbitration in Texas, and signed a stipulation that incorporates many of SWBT's initial positions. The issues raised in the MAN letter have no relevance here.

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These specific examples demonstrate the inadequacy of DOJ's "factual" analysis. Instead of conducting an on-site investigation in Oklahoma, the Department simply has selected self-serving allegations by SWBT's competitors — allegations that it believes will serve its "significant local competition" test — and elevated them, by ipse dixit, to the level of fact. Moreover, it has done so despite flatly contrary OCC factual findings and without providing SWBT any opportunity to respond to specific concerns. Instead of using facts to inform its analysis, as Congress intended, DOJ has let its policy disagreement with Congress determine which allegations it credits and what evidence it will consider.

DOJ apparently has determined that it knows better than Congress: it believes that Bell companies should have to demonstrate actual, significant, and "irreversible" competition in local markets before being allowed into long distance. Congress, however, gave the FCC, not DOJ, final authority over Bell company entry, and the FCC

does not have the luxury to extend Congress's checklist with additional preconditions or to apply DOJ's standard for interLATA relief in place of Congress's. Nor does the FCC have the luxury of ignoring facts or dismissing out of hand the findings of the OCC. The FCC must apply the statute to the totality of the facts, with due respect for the findings of the state agency that has thoroughly investigated those facts and is best positioned to assess them.